

# Council Comments:

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## Unfinished Business: Revising The Michigan Constitution

### The Issue In Brief

At the November general election, Michigan voters rejected the calling of a convention to revise the present Michigan Constitution. However, this result did not change the fact that the state Constitution contains certain deficiencies which should be addressed by policymakers and voters. Chief among these deficiencies are those provisions of the Michigan Constitution which have been unenforceable for years because they violate the federal Constitution. Given the fact that the primary reason for having a written constitution is to inform citizens of the fundamental law by which they are governed, the text of the Michigan Constitution should reflect the actual status of state law. This **Council Comments** examines provisions of the Michigan Constitution that should be deleted and the means by which such constitutional revision may be proposed.

### Background

At the November 1994 general election, Michigan voters rejected the calling of a convention to revise the Michigan Constitution, by a margin of 28 percent to 72 percent. Whether this outcome reflected general satisfaction with the present state Constitution (and, thus, no need for revision) or rejection of a constitutional convention as the means of revision cannot be known. However, a constitutional convention would have entailed certain risks. Because a convention could not have been limited as to its scope, the options within its discretion would have ranged from proposing no changes to completely rewriting the present state Constitution. Voters would have been limited to the role of either adopting or rejecting in its entirety whatever the convention proposed, thus entailing a level of risk to which voters were not willing to subject the fundamental law of Michigan.

The rejection by voters of a constitutional convention did not change the fact that the state Constitution contains certain deficiencies. Chief among these deficiencies are those provisions of the Michigan Constitution which have been unenforceable for many years because they violate the federal Constitution. Given the fact that the primary reason for having written constitutions is to inform citizens of the fundamental law by which they are governed, the text of the Michigan Constitution should reflect the actual status of state law. As discussed below, these deficiencies in the state Constitution may be grouped broadly into two categories: (1) inoperative or obsolete provisions which should be deleted, but which need not be replaced by new provisions and (2) inoperative provisions which should be deleted and be replaced by new provisions.

### Inoperative Provisions Which Should Be Deleted Without Replacement

It may be said in general that voters view constitutional amendments with some degree of suspicion unless they are convinced that the substance of a proposed amendment will

achieve a beneficial result. Certainly it has been the case in Michigan under the present state Constitution that voters have shown great reluctance to alter the fundamental law

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of the state. Fortunately, the beneficial result which would flow from the category of changes about to be examined would require no such alteration. What these provisions have in common, in addition to having been invalid for many years, is that their deletion from the state Constitution need not be accompanied by replacement provisions.

### **Exclusionary Rule**

In **People v Pennington**, (383 Mich 611; 1970), the Michigan Supreme Court held that the last sentence of Section 11 of Article 1, which allowed certain evidence to be admitted into criminal proceedings, violated the exclusionary rule adopted by the United States Supreme Court in **Mapp v Ohio**, (367 US 643; 1961). In general terms, the exclusionary rule provides that evidence obtained by law enforcement in violation of the Fourth Amendment to the United States Constitution must be excluded from criminal proceedings.

### **Voting Age**

The requirement contained in Section 1 of Article 2 that voters be at least 21 years of age was rendered invalid by the Twenty-Sixth Amendment to the United States Constitution which reduced the voting age to 18.

### **Property Ownership Requirement**

Section 6 of Article 2 restricted to property owners the right to vote on certain ad valorem tax limitation increases and bond issues. This provision has not been enforceable since the United States Supreme Court held that such restrictions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. **City of Phoenix v Kolodziejcki**, (399 US 204; 1970). The reference to this prop-

erty ownership requirement found in Section 6 of Article 9 of the state Constitution is inoperative for the same reason.

### **County Board of Supervisors**

Section 7 of Article 7 required that a board of supervisors be established in each county of the state. The board of supervisors was to consist of one member from each organized township and representation from cities as provided by law. In 1966, the Michigan Supreme Court held that the method of apportioning county boards of supervisors violated the equal Protection Clause of the Fourteenth Amendment to the United States Constitution. **Advisory Opinion re Constitutionality of Public Act 261 of 1966**, (380 Mich 736; 1966).

### **Prohibition of Public Aid to Nonpublic Schools**

In 1970, Section 2 of Article 8 was amended to prohibit public financial support for nonpublic schools. The amendment added three sentences to Section 2. In **Traverse City School District v Attorney General**, (384 Mich 390; 1971), the Michigan Supreme Court held that a portion of the second sentence violated the First and Fourteenth Amendments to the United States Constitution (free exercise of religion and equal protection of the laws, respectively). The sentence in question, and that portion of it held invalid, provided that "[n]o payment, credit, tax benefit, exemption or deduction, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or *at any location or institution where instruction is offered in whole or in part to such nonpublic school student.*"

## **Inoperative Provisions Which Should Be Deleted But Be Replaced**

### **Legislative Apportionment**

Those provisions of the state Constitution which formerly governed legislative apportionment best illustrate that category of constitutional provisions which should be

deleted but be replaced by new provisions. Legislative apportionment is the method by which states are divided into geographic districts from which voters elect state Senators and state Representatives. The state Constitution is deficient as regards legislative

apportionment in two respects: it neither specifies what official is responsible for legislative apportionment, nor what standards are to govern the process. Less than one year after the state Constitution was adopted, a majority of the apportionment provisions (Sections 2 through 6 of Article 4) were rendered unconstitutional by virtue of the United States Supreme Court decision of **Reynolds v Sims**, (377 US 533; 1964). The essence of **Reynolds** is that the Equal Protection Clause of the Fourteenth Amendment generally requires that state legislatures be apportioned on the basis of one person one vote.

There the matter has stood over 30 years because neither the Legislature, nor the voters of Michigan through the power to propose constitutional amendments, have chosen to address the issue. It is noteworthy that each of the four Michigan Constitutions adopted since 1835 has contained specific legislative apportionment provisions. This fact suggests voters have deemed it unwise to leave the matter to the discretion of any branch of state government, including the judiciary which by default has conducted the reapportionment process in Michigan for the

last 30 years. Given the historical preference of Michigan voters, and due to the fundamental importance of legislative apportionment, state constitutional provisions specifying what official should bear responsibility for the process and what standards should govern that process would seem a prudent recourse.

### Other Provisions

In addition to the reapportionment provisions, there are two other provisions of the state Constitution which deserve attention because they have been rendered all but inoperative by Michigan courts. The first is Section 6 of Article 9 which imposes limitations upon local property taxation. What the Michigan Supreme Court once said of this provision, that it had been "bruised, beaten and backed to the brink of sterile and forceless words" by the courts remains an accurate description. The other provision, Section 32 of Article 9, which authorizes taxpayers to file suit in the Michigan Court of Appeals to enforce the 1978 Headlee tax limitation amendment essentially has been treated with disdain by the Michigan Court of Appeals.

### The Means of Revision

The Michigan Constitution provides two methods whereby amendments to it may be proposed: (1) by two-thirds of the members in each house of the state Legislature or (2) by petitions containing the signatures of registered electors equal in number to at least ten percent of the votes cast for all gubernatorial candidates at the preceding general election. However, neither method restricts the manner whereby either the Legislature or the people may arrive at the conclusion that a constitutional amendment would be salutary in a given instance. Broadly speaking, there are three methods whereby potential amendments to the state Constitution could be brought to the attention of the Legislature or the people.

#### Law Revision Commission

One purpose of the bipartisan legislative council created by Section 15 of Article 4 of

the Michigan Constitution is to "periodically examine and recommend to the legislature revision of the various laws of the state." This responsibility has been delegated to a Michigan law revision commission established by Public Act 268 of 1986. The commission consists of two members each from the state Senate and House of Representatives, plus four non-legislators. Although Act 268 refers to the "common law and statutes" and does not mention the state Constitution, utilization of the commission to propose to the Legislature constitutional revisions would permit necessary review and recommendations to be formulated by an established body with expertise in law revision.

#### Joint Legislative Commission Or Legislatively-Established Commission

Second, the Michigan Legislature could establish, in accordance with its rules, a joint

committee composed of Senate and House members or could establish by law a commission composed of individuals to be appointed in the manner provided by law. For example, in 1993 the California Legislature established a 23-member commission to recommend by July 1, 1995, constitutional revision of the budget process, the structure of state government, and inter-governmental relations.

#### **Gubernatorial Commission**

Finally, Governors of Michigan on occasion have established by executive order commissions of distinguished citizens to exam-

ine significant public policy issues, including constitutional revision. For example, constitutional revision study commissions were appointed by Governors of Michigan in 1878, 1938, 1941 and 1960. More recently, an eight-member commission was established in 1986 to review management-labor relations in the state classified civil service system and a 12-member commission was established in 1993 to review the effectiveness of, and to make recommendations to strengthen, the 1978 Headlee tax limitation amendment to the Michigan Constitution. These commissions proved to be useful vehicles for studying important matters of public policy.